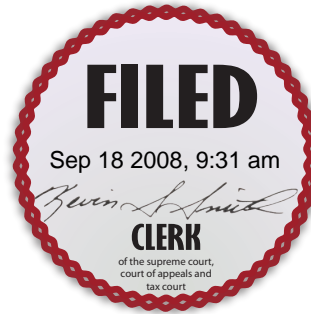


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CORY J. BUEHNER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 87A05-0803-CR-136

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0708-FC-188

September 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Cory J. Buehner (“Buehner”) brings interlocutory appeal from an adult court’s denial of his motion to dismiss six charges, after a juvenile court waived its jurisdiction. We affirm.

Issue

Buehner raises two issues on appeal which we consolidate and restate as whether the juvenile court abused its discretion in waiving its jurisdiction.

Facts and Procedural History

One month and one day before turning eighteen, Buehner was driving a sport utility vehicle (“SUV”) northbound on a highway. Jay Lampton (“Mr. Lampton”) was driving a motorcycle southbound on the same highway with his wife Lisa Lampton (“Mrs. Lampton”) as a passenger. Buehner admitted at the scene that he drove left of the centerline. One or both drivers took evasive action, but the vehicles collided.

Mr. Lampton died at the scene. Mrs. Lampton had fractures to her face, broke all of her teeth, and was in the hospital for two months. Furthermore, she injured both hands, lost use of her right arm and needed a skin graft. Her leg was broken very badly and later had trouble with her knee dislocating. She had several surgeries on her arm and face.

A wooden one-hitter box, which contained marijuana, was found in Buehner’s SUV. The device is commonly used to smoke marijuana.

The State filed a petition alleging delinquency and moved the juvenile court to waive its jurisdiction on all of the counts. The juvenile court waived jurisdiction of count I (reckless homicide) pursuant to Indiana Code Section 31-30-3-5 and waived jurisdiction of

the other five counts pursuant to Indiana Code Section 31-30-3-2.

The State charged Buehner with six counts: reckless homicide, a Class C felony,¹ operating a vehicle causing death with a controlled substance in his body, as a Class C felony,² criminal recklessness causing serious bodily injury, as a Class D felony,³ operating a vehicle causing serious bodily injury with a controlled substance in his body, as a Class D felony,⁴ possession of marijuana, as a Class A misdemeanor,⁵ and possession of paraphernalia, as a Class A misdemeanor.⁶ Buehner moved to dismiss the charges upon the bases that the adult court “lack[ed] jurisdiction over the defendant and the offense [sic] charged.” Appendix at 24. The adult court denied Buehner’s motion to dismiss.

Upon Buehner’s motion, the adult court certified its order for interlocutory appeal. This Court accepted jurisdiction.⁷ Buehner now appeals.

¹ Ind. Code § 35-42-1-5.

² Ind. Code § 9-30-5-5(a).

³ Ind. Code § 35-42-2-2(d).

⁴ Ind. Code § 9-30-5-4(a).

⁵ Ind. Code § 35-48-4-11.

⁶ Ind. Code § 35-48-4-8.3(b).

⁷ On appeal, the State confuses two issues: whether Buehner waived his argument to remain in juvenile court and whether the juvenile court’s waiver of jurisdiction is immediately appealable. Regarding the first issue, the State argues that this is a question of the trial court’s personal jurisdiction and that Buehner waived his argument because he subjected himself to the adult court’s personal jurisdiction. To the contrary, this appeal presents an issue of the adult court’s subject matter jurisdiction. See State ex rel. Camden v. Gibson Circuit Court, 640 N.E.2d 696, 696 (Ind. 1994) (analyzing a juvenile’s waiver into adult court as an issue of subject matter jurisdiction). As the State recognizes in its Appellee’s Brief, a “motion to dismiss based upon lack of jurisdiction over the subject matter may be made at any time.” Ind. Crim. Rule 3, Ind. Code § 35-34-1-4(b), and Appellee’s Brief at 5. Accordingly, Buehner’s argument was not waived.

Discussion and Decision

Buehner seeks to have the State's assertions considered in juvenile court. "We review a juvenile court's decision to waive jurisdiction only for an abuse of discretion. It is for the juvenile court judge, after weighing the effects of retaining or waiving jurisdiction, to determine which is the more desirable alternative." Vance v. State, 640 N.E.2d 51, 57 (Ind. 1994) (citations omitted). We do not reweigh the evidence or judge the credibility of witnesses. K.M. v. State, 804 N.E.2d 305, 308 (Ind. Ct. App. 2004), trans. denied. "We look only to the evidence most favorable to the State and the reasonable inferences to be drawn therefrom, considering both the waiver hearing and the findings of fact given by the court." Id.

At the waiver hearing, the parties stipulated to Buehner's date of birth and that the sum total of facts would establish probable cause. These findings are required criteria for both controlling statutes. See I.C. §§ 31-30-3-2 and -5. Thus, the parties effectively agreed that the juvenile court would evaluate the criteria of the waiver statutes, but not the elements

Under the same heading, the State cites State ex rel. Snellgrove v. Porter Circuit & Juvenile Courts, 270 Ind. 431, 386 N.E.2d 680, 680-81 (1979) for the proposition that a juvenile court's decision to waive jurisdiction is directly, but not immediately, appealable. Id. Indeed, the Snellgrove Court held that "an appeal from a waiver order, valid upon its face, must abate pending a final determination of the criminal prosecution authorized by the waiver." Id. at 681. Snellgrove is inapposite to whether Buehner waived his argument; instead, Snellgrove addresses whether Buehner may bring this appeal at this point in the proceedings.

The State did not file a response to Buehner's motion for this Court to accept jurisdiction of the appeal. See generally Ind. Appellate Rule 14(B)(2)(d). Furthermore, at least three times previously, this Court addressed the merits of a juvenile court's waiver of jurisdiction by accepting jurisdiction of a certified interlocutory appeal, as a matter of grace. In re Tacy, 427 N.E.2d 919, 920 (Ind. Ct. App. 1981), aff'g conviction after trial in adult court, 452 N.E.2d 977, 979 (Ind. 1983) (noting without analysis the interlocutory appeal of the waiver order), rev'd in part on other grounds in post-conviction proceeding, (Ind. Ct. App. 1994), trans. denied. See also Soward v. State, 606 N.E.2d 885, 886 (Ind. Ct. App. 1993) and S.W.E. v. State, 563 N.E.2d 1318, 1319 (Ind. Ct. App. 1990). We therefore review the merits.

of the respective offenses.

As to the charge of reckless homicide, the juvenile court shall waive its jurisdiction “unless it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.” I.C. § 31-30-3-5. Buehner admitted that there was probable cause to believe that he had a controlled substance in his body and that he drove left of the centerline. Furthermore, marijuana and a device used for smoking it were found in Buehner’s SUV. Mr. Lampton died as a result of the accident. Mrs. Lampton lost the use of an arm, broke all of her teeth, sustained multiple fractures in her face, walks with pain, was in the hospital for two months, and underwent several surgeries. Buehner proved himself capable of causing significant harm to members of his community. As the last phrase of the statute is conjunctive, no further analysis is necessary. The juvenile court did not abuse its discretion in waiving its jurisdiction of the reckless homicide charge.

Regarding the other felony charges, the juvenile court may waive its jurisdiction if its finds that:

- (1) the child is charged with an act that is a felony:
 - (A) that is heinous or aggravated, with greater weight given to acts against the person than to acts against property; or
 - (B) . . . ;
- (2) . . . ;
- (3) . . . ;
- (4) the child is beyond rehabilitation under the juvenile justice system; and
- (5) it is in the best interests of the safety and welfare of the community that the child stand trial as an adult.

I.C. § 31-30-3-2.

We addressed above the best interests of the community's safety and welfare, concluding that the facts relevant to this criterion could be found to support waiver. Regarding subsection one, few acts against people could be more heinous or aggravated than recklessly killing and severely injuring others, absent the intent to kill.

With respect to whether Buehner is beyond rehabilitation under the juvenile justice system, a Warrick County probation officer testified as follows:

[T]here's [sic] little dispositional alternatives that juvenile court could offer the juvenile. Um, certainly we could not offer him any kind of residential treatment ah, such treatment is geared for those between ages twelve and seventeen. He'll be nineteen in just a few days. Um, he could not be sent to boy's school and participate in their programs as disposition must occur before the eighteenth birthday. Um, he wouldn't qualify for any pretrial diversion programs or anything of that nature.

Tr. at 28. She noted that "if he fails to comply with those terms and conditions of probation, there's very little consequence[] for that failure." Id. at 32. Buehner argues that this "boils down to a determination that because the defendant is too old to be sent to the Department of Correction, [Indiana Code Section 11-10-2-2], he is beyond rehabilitation of the juvenile justice system." Appellant's Brief at 16. Indeed, the probation officer's testimony was effectively a legal argument, rather than evidence about Buehner himself. She said nothing on direct examination about him, as an individual, other than to confirm his date of birth, to which the parties had stipulated earlier in the same hearing. On cross examination, she stated that Buehner had no prior referrals to juvenile court in Warrick County and that he had no prior offenses on his driving record.

Nonetheless, there was evidence to support a finding that Buehner was beyond rehabilitation in the juvenile justice system. His decisions, made just a month before turning eighteen, had tragic consequences. The juvenile court did not abuse its discretion in waiving its jurisdiction.

Affirmed.

RILEY, J., and BRADFORD, J., concur.